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Supreme Court, U.S.
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No. 03-356

In the Supreme Court of the United States

STANLEY ADAMS, Warden,

Petitioner,

v.

BURT LANCASTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Where, as Here, a State Court Trial Judge Determined That a Prosecutor's Race-Neutral Explanation for the Exercise of a Peremptory Challenge Against an African-American Juror Was the Product of Discriminatory Intent, and Where the State Court Judge Later Reversed Himself on the Erroneous Belief That the Prosecutor's Absence of Challenge to a Subsequently Seated African-American Juror Excused the Discriminatory Challenge to the Earlier African-American Juror, the District and Circuit Courts Properly Considered the Totality of the State Court Judge's Comments and Findings in Concluding That the State Court Judge's Initial Finding Was Entitled to a Presumption of Correctness and That the Prosecutor's Exercise of a Peremptory Challenge Against the Earlier African-American Juror Was Based on Discriminatory Intent in Violation of the Rule of Batson v. Kentucky; Habeas Relief Was Properly Granted, and the Petition Should Be Denied.

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COUNTER-STATEMENT OF THE CASE

Introduction. Respondent Burt Lancaster, a retired Detroit Police officer with a long personal and family history of serious mental health problems, was charged in the underlying case with and convicted of first-degree murder and possession of a firearm in the commission of a felony, M.C.L. §750.316; M.C.L. §750.227b, for having killed his girlfriend in the middle of the day in a parking lot in Southfield, Michigan, on April 22, 1993. Mr. Lancaster's defense to these charges was that he was legally insane at the time of the killing or that, in the alternative, his conduct was partially excused by diminished capacity. Following trial by a jury in Oakland County, Michigan, Circuit Court before Hon. Barry Howard, Oakland Circuit Judge, Mr. Lancaster was convicted as charged and sentenced to a mandatory term of life imprisonment without parole plus two years.

Following exhaustion of his state court remedies, Respondent timely petitioned for a writ of habeas corpus pursuant to 28 USC §2254. On September 25, 2001, Hon. Avern Cohn, Senior United States District Judge, granted the requested relief, finding Respondent's Batson claim to be meritorious but rejecting his other asserted grounds for relief (R26; Opinion and Order Conditionally Granting Writ of Habeas Corpus; Apx 127). On March 26, 2003, the United States Court of Appeals for the Sixth Circuit affirmed, and on June 4, 2003, the Sixth Circuit denied Petitioner's petition for rehearing *en banc*.

Statement of relevant facts. Mr. Lancaster is an African-American. During jury selection at his trial, the prosecutor used a peremptory challenge to excuse Mr. Bowden, one of two African-American males in the venire (Tr 11/07/93, p 115; Apx 331). The prosecutor asked no questions of Mr.

Bowden before moving to strike him (Tr 11/07/94, p 109; Apx 330). Defense counsel objected at the bench on Batson v. Kentucky (476 U.S. 79 (1986)) grounds, and the court conducted a brief hearing during which the prosecutor attempted to justify his action by asserting that Mr. Bowden's tone and temperament in responding to the court's questions left the officer-in-charge feeling uncomfortable (Court/Counsel, Tr 11/07/94, pp 117-120; Apx 333-336).

Judge Howard initially sustained the objection, stating that he did not have the same opinion of Mr. Bowden's responses and that the prosecutor's explanation was not valid (Court/Counsel, Tr 11/07/94, p 120; Apx 336). Judge Howard also expressed concern that permitting the strike to stand would result in only one African-American remaining in the pool of potential jurors (Court/Counsel, Tr 11/07/94, p 108; Apx 329). Later the same day, after another African-American, Mr. Webb, was called as a juror, the prosecutor renewed his objection to Mr. Bowden, and Judge Howard reversed himself without explanation (Court/Counsel, Tr 11/07/94, pp 128, 136-137; Apx 337, 339-341).

Explaining his turn-around the next morning, the judge alluded to the fact that Mr. Webb, who is also African-American, had been seated on the jury:

> ... as the process continued, there was another juror, another African-American, who was selected... Mr. Walton renewed his objection again to Mr. Bordon [sic] ... The Court reflected - the Court, while not satisfied with the original explanation given ... by Mr. Walton with regard to Mr. Bordon [sic] ... however felt that that explanation was given more credibility by the subsequent examination of the other jurors. The Court then reconsidered it's [sic] opinion, in light of

> the examination, and then felt, because of the conduct of the prosecution and the subsequent juror that it was legitimate ...

(Court/Counsel, Tr 11/08/94, pp 3-4; Apx 334-345).

REASONS FOR DENYING THE WRIT

This Court's efforts to eliminate racial discrimination in jury selection policies and practices began well over a century ago. In Strauder v. Virginia, 100 U.S. 303 (1880), this Court struck down a statute qualifying only white persons for jury duty as violative of the Fourteenth Amendment's central purpose, removing all discriminations implying "inferiority in civil society, lessening the security of their [African-Americans'] enjoyment of the rights which others enjoy".

In Smith v. Texas, 311 U.S. 128 (1940), this Court stressed that "racial discrimination in the exclusion from jury service of otherwise qualified groups not only violates the Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

In Swain v. Alabama, 380 U.S. 202 (1965), this Court considered not a discriminatory statute but prosecutors' racially discriminatory exercise of peremptory challenges. The Court was unwilling in Swain to limit litigants' historical privilege of exercising peremptory challenges without judicial intervention, instead placing on the defense the heavy burden of establishing that the whole peremptory challenge system was being perverted before relief would be granted. By the mid-1980s, however, Swain's failure to prevent chronic and widespread racial discrimination in jury selection and the need for a new rule with teeth in it had become clear. Batson v.

Kentucky, 476 U.S. 79 (1986), established that new rule and has been a watershed in the Court's efforts to monitor and prevent (or at least reduce) the use of racial discrimination in litigants' exercise of peremptory challenges.

Batson's now-familiar three-step test[1] is designed to provide a workable means for avoiding the unconstitutional exclusion of even a single minority juror. *Cf.* Batson, *supra*, 476 U.S. at 95. Where such improper exclusion occurs, the harm accrues not only to the accused but also to "jurors not selected because of their race, and to the integrity of the judicial system as a whole". *Id.* 476 U.S. at 87-88; United States v. Harris, 192 F.3d 580, 587-588 (6th Cir. 1999); United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987) (striking a single African-American on the basis of race

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[1] The defense must first make out a *prima facie* case of purposeful discrimination, after which the burden shifts to the prosecution to offer a race-neutral explanation for the challenge. The final step in the analysis is for the court to decide whether the opponent of the strike has proved purposeful racial discrimination by a preponderance of the evidence. Batson, *supra*, 476 U.S. at 98; Purkett v. Elem, 514 U.S. 765 (1995); United States v. Tucker, 90 F.3d 1135, 1142 (6th Cir. 1996). However, "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate issue intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot". Hernandez v. New York, 500 U.S. 352, 359 (1991); United States v. Harris, 192 F.3d 580, 587 (6th Cir. 1999). Moreover, the *prima facie* prong of the test was "never intended to be rigid, mechanized or ritualistic ... [and] is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination". Unites States Postal Service v. Aikens, 460 U.S. 711, 715 (1983).

violates equal protection even though other black jurors seated).

Batson's protection against the unconstitutional exclusion of even a single juror, and the state court trial judge's misapprehension of this fundamental rule, are at the heart of this case. As the Sixth Circuit and Judge Cohn properly understood, a prosecutor's racially motivated challenge of one juror is not excused by his absence of such improper conduct as to a later minority juror. Judge Cohn spoke directly to this point in his opinion:

> The fact that another African-American took a seat in the jury box, a fact which apparently greatly influenced the trial court, was irrelevant ... "[a] single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions."

(R26; Opinion and Order Conditionally Granting Writ of Habeas Corpus at p 9 (cite omitted); Apx 135).

In coming to his conclusion, Judge Cohn was called upon to consider the totality of the state court trial judge's comments and actions on the issue, and he did so thoughtfully and carefully. He examined the judge's initial decision to sustain the Batson objection to Mr. Bowden, he considered the judge's reversal of field when Mr. Webb, another African-American juror, was seated, and he took into account the judge's explanation the next morning as to why he had changed his earlier decision, an explanation which included reference to the fact that Mr. Webb was African-American.

Petitioner would have this Court limit Judge Cohn's consideration of the record to the state court trial judge's last

statement on the issue rather than the totality of the circumstances. Such a rule would overlook the obvious fact that, in order fairly to assess what the trial judge meant by the words he used in his last comment, one *must* consider the surrounding circumstances, particularly where, as here, the comment itself makes reference to those circumstances and can only be properly understood by consideration of them. The district and circuit courts properly rejected such a position.

Taking out of context the trial judge's reference to a reassessment of the prosecutor's explanation, Petitioner argues to this Court that the comment must be held to mean that the trial judge had come to decide that the prosecutor's decision to strike Mr. Bowden was not on the basis of race. Given the timing of the trial judge's abrupt reversal of field -- *e.g.*, when another African-American juror was seated -- and his mention of that circumstance in his next day's comments, it is entirely reasonable to question whether the judge's comments meant something very different from what Petitioner is arguing. Considering the totality of the circumstances, the trial judge most likely meant that, since the prosecutor was not excluding all minorities, as he was willing to keep Mr. Webb on the jury, he (the prosecutor) was not going overboard, and the judge was, therefore, willing to permit the prosecutor to trade Mr. Webb's presence for that of Mr. Bowden. It also appears that the judge's conclusion was based on a misunderstanding of the extent to which Batson and its progeny prohibit the use of race as a consideration in excluding even a single juror.

In deciding this case, Judge Cohn was necessarily required to decide what the trial judge meant in all of his comments and actions and whether the trial judge's analysis had been based on a correct or incorrect interpretation of Batson. That

task included fact determinations a federal court accepts unless clearly erroneous. Greene v. Brigano, 123 F.3d 917 (6th Cir. 1997); Sinistaj v. Burt, 66 F.3d 804, 807 (6th Cir. 1995). Judge Cohn's conclusion that the trial judge had "apparently [been] greatly influenced" by the presence of another African-American in the jury box is not only amply supported by the record, it is, ultimately, the only logical explanation of why the trial judge did and said what he did when he did. As Judge Cohn also noted, however, and as the law is clear, the fact that "the prosecution subsequently permitted another African-American to be seated was also irrelevant" (R26; Opinion and Order at p 9; Apx 135).

Judge Cohn's conclusion -- and the trial judge's initial conclusion -- is further supported by the extreme thinness of the prosecutor's explanation of reasons for striking Mr. Bowden, an explanation that was subjective and unrelated to the case. The prosecution's attempt to attribute the decision to strike Mr. Bowden to the officer-in-charge, who was also African-American, transparently sought to pass the buck to a, hopefully, more palatable source for a discriminatory challenge. The ploy was too clever, however, and was further reason to question the sincerity of the prosecutor's words. [The tactic, if accepted, would also virtually eliminate the protections of Batson in any case in which the officer-in-charge or prosecutor is a member of the same racial or ethnic group as the accused.] While prosecutors are given very substantial latitude in offering race-neutral reasons to support peremptory challenges of minority jurors, courts have not hesitated to reject them as pretexts when they are "[i]mplausible or fantastic". *Cf., e.g.,* McClain v. Prunty, 217 F.3d 1209, 1218 (9th Cir. 2000) (exercise of peremptory against minority juror because she was "'overly educated'" and because of her body language inadequate as race-neutral explanation of strike); Coulter v. Gilmore, 155 F.3d 912, 920

(7th Cir. 1998) (explanation that juror seemed "timid" "verg[ed] on the absurd"); United States v. Horsley, 864 F.2d 1543, 1544 (11th Cir. 1989) ("I just got a feeling about him" legally insufficient). Both Judge Cohn and the Sixth Circuit properly found that, given the totality of this record, the prosecutor's explanation was outside the range of acceptable claims.

The Sixth Circuit's concluding comments well sum up why habeas relief was properly granted in this case:

> ... without more, the prosecutor's decision to select a subsequent African-American juror from the venire does nothing to cure the wrong committed under *Batson* in excluding Bowden because of his race. Where purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor's impermissible use of a peremptory strike to exclude a venire member on the basis of race confounds the central teachings of *Batson*.

Lancaster v Adams, 24 F.3d 423, 434 (6th Cir. 2003).

Finally, it is important to note that a Batson error is structural error not subject to harmless error analysis. Harris, *supra*, 192 F.3d at 588; United States v. McFerron, 163 F.3d 952, 956 (6th Cir. 1998).

For all the reasons stated above, Judge Cohn's decision was correctly arrived at procedurally, it was the correct decision substantively, and the Sixth Circuit properly affirmed that decision. The issues raised by Petitioner do not warrant

the exercise of this Court's discretionary jurisdiction, and the Petition should be denied.[2]

CONCLUSION

For all the reasons stated above, the Petition should be denied.

Respectfully Submitted,

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October 3, 2003

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[2] For these reasons, Petitioner's second asserted reason for granting the writ -- focusing on the state court's ultimate legal conclusion rather than on whether the Michigan Court of Appeals erred in its application of Batson, *supra*, and Hernandez, *supra* -- also fails and warrants no further discussion.